Awtar Singh a/l Puran Singh v Majlis Peguam Malaysia

HIGH COURT (IPOH) — ORIGINATING MOTION NO 25NCVC-47 OF 2011
ZAINAL ADZAM J, TEO SAY ENG JC AND CHOONG SIEW KHIM JC
30 JANUARY 2012

Legal Profession — Professional discipline — Reinstatement — Restoration of name to roll of advocates and solicitors — Principles to be applied in considering application — Legal Profession Act 1976 ('LPA') s 107(1) — Whether being struck off for five years gave rise to automatic right to be reinstated — Whether applicant had rehabilitated during the interim period — Burden of proof on applicant — Whether applicant was a fit and proper person to have his name restored to the Roll

The applicant, a former advocate and solicitor applied for his name to be reinstated on the Roll of Advocates and Solicitors under s 107 of the Legal Profession Act 1976 ('LPA'). The applicant was struck off the Roll of Advocates and Solicitors based on two complaints lodged against him with the disciplinary board. The first complaint was that the applicant had failed to remit to his client the taxed costs received in a suit. The second complaint was that the applicant had failed to appear in court in a matter resulting in the matter being struck off. The applicant had appointed another firm to apply for a reinstatement of the matter without the knowledge of his client. Eventually, the client discharged the services of the applicant and requested the refund of the sum of RM1,000 paid as fees, which the applicant refused. The Bar Council filed an affidavit opposing the application for reinstatement by the applicant. The applicant submitted that his name should be restored to the Roll based on the fact that he had been suspended for more than five years.

Held, dismissing the application with costs:

(1) (per **Teo Say Eng JC**)The application for reinstatement was made under s 107(1) of the LPA76. It is clear from the wording of s 107 that: (i) the court may at any time order reinstatement if it thinks fair and reasonable; and (ii) the court must consider the views of the Bar Council. In exercising its judicial discretion as to whether to reinstate the name of the applicant to the Roll, the court must consider the following: (a) the protection of the public and the profession as a whole over and above the interests of the applicant as its primary duty; (b) the application of a person who has previously been struck off the Roll for grossly improper conduct must necessarily be subjected to stricter scrutiny than that of a new entrant to the profession who has no adverse record; (c) unless the

court is completely satisfied on all the material before it that there is no likelihood that the appellant will repeat the same offence or any other offence of a similar nature in the discharge of his professional duties and that he is now deserving of re-admission to an honourable profession the court should not replace his name on the Roll (see para 12); *Re Ram Kishan* [1992] 1 SLR 529 referred.

(2) (per **Teo Say Eng JC**) The mere fact that the appellant was struck off for five years and more did not give rise to an automatic right to be reinstated although it may be a factor to be considered. What was more important to be considered was for the court to focus on the intrinsic character of the applicant that is to say, whether the applicant had rehabilitated during the interim period. The onus was on the applicant to show: (i) there had been such a change in his character as to make him a fit and proper person to resume practice at the Bar; (ii) he was truly penitent; and (iii) he had made restitution (see para 17); *Teoh Hooi Leong v Bar Council, Malaysia* [1991] 2 MLJ 190 (referred); *Chan Chow Wong v Malaysia Bar* [1986] 2 MLJ 159 referred.

(3) (per **Teo Say Eng JC**) The appellant produced three character references, the first testifying, among other things that the applicant had lived a morally blameless life since he was struck off the roll and the other two merely stating that the applicant was a fit and proper person to be restored to the Roll. The three character references by themselves were not sufficient to show that there was a change in the character of the applicant. The court found that the applicant was never remorseful at all for what he had done (see para 19).

(4) (per **Teo Say Eng JC**) Despite the fact that the applicant had made the restitution, the court found that he had not demonstrated through his conduct and actions during the interim period that he had fully rehabilitated and was now a fit and proper person to be restored to the Roll (see para 20).

(5) (per **Choong Siew Khim JC, dissenting**) As a matter of public policy a heavy burden should be imposed on an applicant pursuant to s 107 of the LPA to satisfy the court that he is a fit and proper person to have his name restored to the Roll (see para 23).

(6) (per **Choong Siew Khim JC, dissenting**) It is incumbent upon the court to exercise its discretion for applications of this nature according to the particular facts of the case and having regard to the materials put before it. The key words are 'fair and reasonable' under s 107(1) of the LPA (see para 24).

(7) (per **Choong Siew Khim JC, dissenting**) The applicant had cogently discharged his burden based on affidavit evidence in convincing the court that he was now a fit and proper person to have his name restored to the

Roll. There was nothing which was against the public interest to order otherwise. The applicant had adequately paid his dues for what he ought not have done in the first place. Thus, it was fair and reasonable to allow the application by restoring the applicant's name to the Roll (see paras 31–32).

[Bahasa Malaysia summary

Pemohon, bekas peguambela dan peguamcara telah memohon namanya dimasukkan semula dalam daftarai peguambela dan peguamcara di bawah s 107 Akta Profesion Undang-Undang 1976 ('APU'). Nama pemohon telah dibatalkan dari daftarai peguambela dan peguamcara berdasarkan dua aduan yang dibuat terhadapnya oleh Lembaga Tatatertib. Aduan pertama adalah kerana pemohon telah gagal meremitkan kepada anakguamnya kos yang dikenakan cukai yang telah diterima dalam guaman. Aduan kedua adalah kerana pemohon telah gagal hadir di mahkamah dalam perkara yang mengakibatkan perkara itu dibatalkan. Pemohon telah melantik firma lain untuk memohon pengembalian jawatan berhubung perkara tersebut tanpa pengetahuan anakguamnya. Akhirnya, anak guam itu telah menghentikan khidmat guaman pemohon dan meminta dipulangkan sejumlah wang RM1,000 yang telah dibayar sebagai fi, yang mana pemohon enggan berbuat demikian. Majlis Peguam telah memfailkan afidavit membantah permohonan pengembalian jawatan oleh pemohon itu. Pemohon telah berhujah bahawa namanya patut dimasukkan semula dalam daftarai berdasarkan fakta bahawa dia telah digantung lebih daripada lima tahun.

Diputuskan, menolak permohonan dengan kos:

(1) (oleh **Teo Sy Eng PK)** Permohonan untuk pengembalian jawatan yang dibuat di bawah s 107(1) APU. Adalah jelas daripada perkataan s 107 bahawa: (i) mahkamah boleh pada bila-bila masa memerintahkan pengembalian jawatan jika difikirkan adil dan munasabah; dan (ii) mahkamah perlu mengambil kira pandangan Majlis Peguam. Dalam melaksanakan budi bicara kehakimannya berhubung sama ada untuk memasukkan semula nama pemohon dalam daftarai, mahkamah perlu mengambil kira yang berikut: (a) perlindungan pihak awam dan profesion tersebut secara keseluruhan mengatasi kepentingan pemohon sebagai kewajipan utamanya; (b) permohonan seseorang yang sebelumya telah dibatalkan dari daftarai kerana salah laku melampau yang wajar dikenakan penelitian lebih ketat daripada seorang yang baru dalam profesion tersebut tanpa rekod buruk; (c) kecuali jika mahkamah berpuas hati dengan semua material di hadapannya bahawa tiada kebarangkalian bahawa pemohon akan mengulangi kesalahan sama atau apa-apa kesalahan lain yang sama sifatnya dalam melaksanakan kewajipan professionalnya dan bahawa dia kini layak dimasukkan semula sebagai

profesion yang mulia maka mahkamah tidak patut menggantikan namanya dalam daftarai (lihat perenggan 12); *Re Ram Kishan* [1992] 1 SLR 529 dirujuk.

(2) (oleh **Teo Say Eng PK)** Fakta bahawa perayu telah dibatalkan namanya selama lima tahun dan lebih tidak menimbulkan hak automatik untuknya dikembalikan jawatan meskipun ia faktor yang boleh diambil kira. Apa yang lebih penting perlu dipertimbangkan adalah agar mahkamah memberi fokus kepada ciri-ciri intrinsik pemohon yang mana, sama ada pemohon telah mengubah sikapnya dalam tempoh interim itu. Beban terletak atas pemohon untuk membuktikan: (i) terdapat perubahan dalam sikapnya agar dia sesuai dan seorang yang wajar dimasukkan semula dalam Majlis tersebut; (ii) dia telah insaf; dan (iii) dia telah membuat restitusi (lihat perenggan 17); dirujuk.

(3) (oleh **Teo Say Eng PK)** Pemohon telah mengemukakan tiga rujukan sikap, pertama dengan memberi keterangan, antara lain, bahawa pemohon telah hidup tanpa melakukan apa-apa kesalahan sejak namanya dibatalkan dari daftarai dan yang dua lagi dengan hanya menyatakan bahawa pemohon seorang yang sesuai dan wajar dimasukkan kembali dalam daftarai itu. Tiga rujukan sikap itu dengan sendirinya tidak mencukupi untuk menunjukkan terdapat perubahan dalam sikap pemohon. Mahkamah mendapati pemohon tidak pernah rasa bersalah terhadap segala yang telah dilakukannya (lihat perenggan 19).

(4) (oleh **Teo Say Eng PK)** Walaupun hakikatnya pemohon telah membuat restitusi, mahkamah mendapati yang dia tidak menunjukkan melalui perlakuan dan tindakannya dalam tempoh interim itu bahawa dia sepenuhnya telah mengubah sikanya dan kini seorang yang sesuai dan wajar untuk dimasukkan kembali namanya dalam daftarai (lihat perenggan 20).

(5) (oleh **Choong Siew Khim PK, menentang)** Demi perkara berkaitan polisi awam, beban yang berat patut dikenakan ke atas pemohon menurut s 107 APU untuk meyakinkan mahkamah bahawa dia seorang yang sesuai dan wajar untuk dimasukkan kembali namanya dalam daftarai (lihat perenggan 23).

(6) (oleh **Choong Siew Khim PK, menentang)** Adalah wajar untuk mahkamah melaksanakan budi bicaranya untuk permohonan seperti ini menurut fakta tertentu kes dan berdasarkan material yang dikemukakan di hadapannya. Kata kunci adalah 'adil dan munasabah' di bawah s 107(1) APU (lihat perenggan 24).

(7) (oleh **Choong Siew Khim PK, menentang)** Pemohon telah melepaskan bebannya berdasarkan afidavit keterangan dalam meyakinkan mahkamah bahawa dia bukan seorang yang sesuai dan wajar untuk

dimasukkan balik namanya dalam daftarai. Tiada apa-apa yang menghalang kepentingan awam unuk diperintahkan sebaliknya. Pemohon telah dikenakan balasan dengan secukupnya untuk apa yang tidak sepatutnya dilakukannya sebelum ini. Oleh itu, adalah adil dan munasabah untuk membenarkan permohonan itu dengan memasukkan semula nama pemohon dalam daftarai tersebut (lihat perenggan 31–32).]

Notes

For cases on reinstatement, see 9 *Mallal's Digest* (4th Ed, 2012) paras 1908–1910.

Cases referred to

Chan Chow Wang v Malaysian Bar [1986] 2 MLJ 159 (refd)
Lim Cheng Peng, Re [1988] 1 MLJ 231 (refd)
Ram Kishan, Re [1992] 1 SLR 529, HC (folld)
Teoh Hooi Leong v Bar Council, Malaysia [1991] 2 MLJ 190, SC (folld)
Thavanathan a/l Balasubramaniam v Majlis Peguam Negara [2007] 8 MLJ 684, HC (refd)

Legislation referred to

Legal Profession Act 1976 ss 103(c)(iii), 103D, 107, 107(1), (3), 130D, 170(1)

P Awtar Singh a/l Puran Singh in person.
Babu Raj Gopal (Kean Chye & Sivalingam) for the repondent.

Zainal Adzam J:

[1] Saya telah membaca dan meneliti alasan-alasan penghakiman YA En Teo Say Eng dan YA Puan Choong Siew Kim. Dengan hormatnya saya setuju penuh dengan alasan penghakiman YA En Teo Say Eng bahawa permohonan ini tidak patut dibenarkan. Permohonan ini ditolak dengan kos.

Teo Say Eng JC:

[2] This is an application by originating motion by Awtar Singh a/l Puran Singh, a former advocate and solicitor that his name be reinstated on the Roll of Advocates and Solicitors under s 107 of the Legal Profession Act 1976.

BACKGROUND FACTS

[3] Mr Awtar ('the applicant') read law at University of London and was called to the Bar on 8 December 1992. Thereafter, he practised law as a legal

assistant at Messrs Manikam Avadiar & Co from 15 January 1993 to 31 May 1993. Between 14 June 1993 and 31 October 1994, the applicant practised at Messrs Mohd Ismail & Co as a legal assistant. The applicant set up a sole proprietorship under the name and style of Messrs AS Saini & Associates on or about 1 November 1994 until closure of the firm on 31 December 2002. He was in possession of his last practising certificate for the year 2002.

:

BACKGROUND OF COMPLAINTS

[4] On 26 October 2001 the Bar Council referred two complaints received from one H'ng Chye Jin ('the complainant') (acting on behalf of Jin Plantation Sdn Bhd) against the applicant to the disciplinary board. The applicant was subsequently struck off the roll on 25 March 2006.

[5] The applicant was struck off the Roll of Advocates and Solicitors based on two complaints lodged against him with the disciplinary board.

First complaint

(a) Sometime in 1995, the complainant engaged the applicant to handle a civil suit against one Kwan Tung Association ('the defendant'). The suit was disposed of on 27 July 1999 and a judgment sum of RM70,383.38 together with costs was awarded in favour of the complainant. Partial payment of RM30,000 was made by the defendant on 16 December 1999 and a writ of seizure was issued against the defendant on 24 December 2000 for the balance sum outstanding amounting to RM43,169.66 (sum outstanding). The writ was executed and consequently the defendant paid the sum outstanding which the complainant acknowledged as being the full and final settlement;

(b) the applicant was to tax the costs and on 24 October 2000 an allocator was sealed by the court for RM44,737. The applicant received the sum on 20 December 2000 but failed to make remittance of the same to the complainant; and

(c) the agreed professional fees of RM8,600 was fully paid by the complainant to the applicant.

Second complaint

(a) In May 1999, the complainant engaged the applicant to sue the director of land and mines, Perak and seven others for an order of mandamus at the High Court of Taiping;

(b) the complainant paid RM1,000 to the applicant towards fees;

(c) the complainant was given an impression that the matter was proceeding smoothly;

(d) on the date of the hearing, the applicant failed to appear in court resulting in the matter being struck off. The court allowed reinstatement subject to the complainant paying the opposing party the sum of RM500 as costs being condition for reinstatement;

(e) the application for reinstatement was handled by a firm of solicitors appointed by the applicant without the knowledge of the complainant; and

(f) eventually, the complainant discharged the services of the applicant on realising his incompetence and requested the refund of the sum of RM1,000, which the applicant refused.

FINDING AND RECOMMENDATIONS OF THE DISCIPLINARY COMMITTEE

[6] In respect of the first complaint, it was established that the applicant had received the taxed costs on 20 December 2000 but failed to release the said sum to the complainant. Furthermore, the agreed fee of RM8,600 had been paid by the complainant to the applicant. In respect of the second complaint, the Disciplinary Committee was of the view that the applicant had no acceptable excuse for his conduct. Based on the evidence tendered before the Disciplinary Committee, it recommended that the applicant be struck off the Roll by virtue of s 103(c)(iii) of the LPA 1976. The applicant was struck off from the Advocates and Solicitors Roll on 25 March 2006 by the disciplinary board.

[7] The applicant had earlier filed an Originating Motion No 25–8 of 2007 in Taiping High Court to set aside the disciplinary board's order dated 25 March 2006 made pursuant to s 103D of the Legal Profession Act 1976 ('LPA 1976').

[8] The High Court of Taiping dismissed the applicant's appeal with cost on 24 August 2009.

[9] Thereafter, the Court of Appeal also dismissed the applicant's appeal on 14 February 2011.

[10] The applicant now files an application under s 107 of the LPA 1976 for

readmission.

THE LAW

[11] The application for reinstatement is made under s 107(1) of the Legal Profession Act 1976 which reads:

(1) The High Court may, if it thinks fair and reasonable, at any time order the registrar to restore to the Roll the name of an advocate and solicitor which has been removed from, or struck off, the Roll.

(2) Any application that the name of an advocate and solicitor restored to the Roll shall be by originating motion supported affidavit, before the High Court.

(3) Notice of the motion shall be served on the Bar Council which shall be represented at the hearing of the motion and shall place before the court a report which shall include copies of the record of any proceedings as the result of which the name of the advocate and solicitor was removed from, or struck off, the Roll and a statement of any facts which have occurred since the name of the advocate and solicitor was removed from, or struck off, the Roll and which in the opinion of the Bar Council or any member of it are relevant to be considered or to be investigated in connection with the application.

[12] It is clear from the wording of s 107 that:

(a) the court may at any time order reinstatement if it thinks fair and reasonable, and

(b) the court must consider the views of the Bar Council.

In exercising its judicial discretion as to whether to reinstate the name of the application to the Roll, the court must consider the following:

(a) the protection of the public and the profession as a whole over and above the interests of the applicant as its primary duty;

(b) the application of a person who has previously been struck off the roll for grossly improper conduct must necessarily be subjected to stricter scrutiny than that of a new entrant to the profession who has no adverse record; and

(c) unless the court is completely satisfied on all the material before it that there is no likelihood that the appellant will repeat the same offence or any other offence of a similar nature in the discharge of his professional duties and that he is now deserving of re-admission to an honourable profession the court should not replace his name on the Roll: *Re Ram Kishan* [1992] 1 SLR 529 at p 533.

THE APPLICANT'S SUBMISSION

[13] The applicant in support of his application filed two affidavits in encls 3 and 14 affirmed by himself enclosing, among other things three character references by three practising advocates and solicitors.

THE BAR COUNCIL'S VIEW

[14] The Bar Council had in turn filed an affidavit affirmed by its honourary secretary in encl 9 in opposing the application for reinstatement by the applicant.

[15] The Bar Council is of the view that the following relevant facts must be taken into consideration by the court in hearing an application for reinstatement:

(a) as a matter of public policy a heavy burden should be imposed on an applicant pursuant to s 107 to satisfy the court that he is a fit and proper person to have his name restored to the Roll;

(b) the applicant has mentioned that he has never committed any error since the inception of his life and is not aware of any objections from fellow members of the bar towards his reinstatement. The Bar Council failed to receive two references to vouch his credibility as a fit and proper person to be restored to the Roll;

(c) the applicant admitted that he had committed a technical error in retaining the costs due to the complainant; and

(d) the bar council failed to receive documentary evidence from the applicant that he has made good the monies due and owing to the complainant.

[16] By reason of the above, the Bar Council is of the view that Mr Awtar Singh s/o Puran Singh has failed to satisfy the burden of proving that he is a fit and proper person to be restored to the Roll and wished to oppose his application as conduct of this nature is too prevalent and must be strongly discouraged.

ISSUE FOR DETERMINATION

Is the applicant a fit and proper person to be restored to the Roll?

[17] The applicant submits that his name should be restored to the Roll based on the fact that he has been suspended for more than five years. I find that

such a submission is without merit as it is clear from the case law that the mere fact that the appellant was struck off for five years and more does not give rise to an automatic right to be reinstated although it may be a factor to be considered: *Ram Kishan Re* [1992] 1 SLR 529. What is more important to be considered here is for the court to focus on the intrinsic character of the applicant that is to say, whether the applicant has rehabilitated during the interim period. See *Teoh Hooi Leong vs Bar Council, Malaysia* [1991] 2 MLJ 190. The onus is on the applicant to show:

(a) there has been such a change in his character as to make him a fit and proper person to resume practice at the Bar;

(b) he is truly penitent; and

(c) he has made restitution: see *Chan Chow Wong v Malaysia Bar* [1986] 2 MLJ 159.

[18] In the present case, the appellant has produced three character references, the first testifying, among other things that the applicant has lived a morally blameless life since he was struck off the Roll and the other two merely stating that the applicant is a fit and proper person to be restored to the Roll.

[19] Although the three character references were not controverted by the respondent I find that they by themselves are not sufficient to show that there was a change in the character of the applicant. In fact from the facts disclosed in his two affidavits and by his conduct in conducting the application in court, I find that the applicant was never remorseful at all for what he had done.

Firstly, he refused to accept the decision made by the disciplinary board and then filed an originating motion to the Taiping High Court to set aside the disciplinary board's order made under s 130D of the Legal Profession Act 1976. He then appealed to the Court of Appeal when his appeal was dismissed by the Taiping High Court. However his appeal to the Court of Appeal was finally dismissed on 14 February 2011.

Secondly, he still maintained that his refusal to release the party and party costs is a mere technical error despite the fact that the Court of Appeal had dismissed his appeal against the decision of the Taiping High Court in refusing to set aside the Disciplinary Board's order. I do not see any sense of remorsefulness of the applicant on his misconduct.

On the issue of restitution, the applicant was trying to justify that he was no longer required to return the party and party costs to the complainant as he was trying to rely on (i) that he has obtained an allocator against the company of which the complainant was a director for the amount of RM52,430.95 after the bill of costs between solicitor and client in GS22–4–96 which has been taxed on 18 October 2002 and (ii) the claim of the company of which the plaintiff was a director in Civil Suit 22–29 of 2003 for the return of the taxed

costs which had been struck off whilst his counterclaim for libel in the suit against the complainant was allowed on 24 October 2005 with damages assessed at RM100,000 on 25 July 2008 and there was no appeal against the decision. Since the facts constituting restitution adduced by the applicant were not controverted, I accept that the applicant is deemed to have made the restitution.

DECISION

[20] Despite the fact that the applicant has made the restitution, I find that from the materials which are before me he has not demonstrated through his conduct and actions during the interim period that he has fully rehabilitated and is now a fit and proper person to be restored to the Roll. I am not completely satisfied that there will be no likelihood that the applicant will repeat the same offence in future as he still maintains until the date of the hearing of this application that what he did is not wrong but a mere technical error.

[21] Having considered all the facts and circumstances of this case, I am of the view that in the interest of the public and the profession as a whole, this application should not be allowed and accordingly is dismissed with costs.

Choong Siew Khim JC:

[22] This is an application by Awtar Singh a/l Puran Singh ('the applicant') to be restored to the Advocates & Solicitors Roll. It is noted that he had prior to this filed an application vide OM 25–8 of 2007 to set aside the disciplinary board's order to strike him off the Roll dated 25 March 2006. The High Court at Taiping dismissed the application and on appeal was dismissed by the Court of Appeal on 14 February 2011.

[23] The High Court may consider an application for readmission if it thinks it fair and reasonable (s 170(1) of the Legal Profession Act 1976). In the exercise of its discretionary power, the High Court must consider the application judicially besides taking into account the views of the Bar Council (see *Re Lim Cheng Peng* [1988] 1 MLJ 231 and *Re Ram Kishan* [1992] 1 SLR 529). The onus is also upon the applicant to convince this court comprising three judges that he is still a person on whose integrity and honour reliance may be placed. The primary consideration is the protection of the interests of the public and the legal profession as a whole over and above the interests of the applicant (*Re Ram Kishan*). The key words that appear and recur in cases of the same ilk are integrity and honour, whether the applicant is truly penitent and undergone a change in character as to make him a fit and proper person to

resume practice at the Bar which is a heavy burden (see *Chan Chow Wang v Malaysian Bar* [1986] 2 MLJ 159 and *Thavanathan a/l Balasubramaniam v Majlis Peguam Negara* [2007] 8 MLJ 684).

[24] The then Supreme Court in *Teoh Hooi Leong v Bar Council, Malaysia* [1991] 2 MLJ 190 in allowing the applicant's appeal against the High Court's decision to dismiss his s 107 application held in this manner:

(a) under s 107(1) of the Legal Profession act 1976, the High Court may, if it thinks it fair and reasonable, order the registrar to restore the name of any advocate and solicitor which has been removed or struck off the Roll. The word 'fair' must necessarily mean that the decision must be fair to members of the public, to the court and last but not least to the advocate and solicitor concerned. To be reasonable the decision must be based on reasonable grounds and be supported by cogent evidence and not one based on conjecture or speculation;

(b) a conviction should not be regarded in every case as a permanent unfitness. Disbarment is not necessarily intended to be permanent but that a heavy burden lay upon an applicant to show that he is now a fit and proper person to have his name restored to the Roll. The lapse of time since the conviction is thus a material consideration. It is true that there should be strong disinclination to readmit to the profession an advocate and solicitor who had been guilty of improper conduct. The principle that once a solicitor has been struck off the Roll for dishonesty he cannot be restored unless there are exceptional circumstances should no longer apply in absolute terms. If an advocate and solicitor lives a blameless life and there is evidence that he has rehabilitated himself generally and there are members of title profession who can vouch to this change, that may overcome the initial misconduct; and

(c) the duty of the court in a case like this is to exercise its discretion having regard to the materials available before it and the particular facts of the case. The question should be seen as an exercise of discretion according to particular facts of the case. It should never be regarded as a principle laid down as a rule of law that an advocate and solicitor who has been struck off the Roll for dishonesty can never be reinstated.

[25] Prior to being struck off, the applicant stopped practice on 31 December 2002. The facts behind and prior to his being removed from the Roll have been succinctly set out in the grounds of judgment of YA Dato' Dr Hj Hassan bin Ab Rahman who heard and dismissed the motion to set aside the order to strike off his name (see exh 'AS4' annexed to the applicant's second affidavit in reply 'Affidavit Balasan II'). Nevertheless the crux of the complaint that eventually led to disciplinary action and his removal centred on RM44,737 on account of taxed costs which the applicant failed to remit to his

client, the plaintiff in Civil Suit 22–4 of 1996 ('the 1996 case') at the High Court in Taiping. The complainant was a director of the plaintiff company.

[26] In a nutshell, based on my comprehension of the affidavits filed by the applicant to support the instant application and to counter the respondent's affidavit in objecting to the application, the reason or the basis for the complaint that led to the striking off has been extinguished by the fact that the suit filed by the same plaintiff against the applicant in Civil Suit 22–29 of 2003 for the return of the said sum of RM44,737 (which arose from the 1996 case wherein the applicant acted for the plaintiff) had been struck out on 24 October 2005 whilst the applicant's counterclaim for libel in the same suit against the plaintiff company had been allowed with damages assessed at RM100,000 on 25 July 2008. There was no appeal against this decision. There is no dispute that the respondent was aware of the pending suit in 22–29 of 2003 when disciplinary proceedings were on-going against the applicant.

[27] The respondent placed before the court a report (exh 'TW1' annexed to the affidavit of the respondent's secretary, Tony Woon Yeow Thong, affirmed on 8 August 2011) pursuant to s 107(3) of the Legal Profession Act. Apart from stating the background of the complaints, the following four relevant facts were highlighted for the court's consideration:

(a) as a matter of public policy a heavy burden should be imposed on an applicant pursuant to s 107 to satisfy the court that he is a fit and proper person to have his name restored to the Roll;

(b) the applicant has mentioned that he has never committed any error from the inception of his life and is not aware of any objections from fellow members of the Bar towards his reinstatement. The Bar Council failed to receive two references to vouch his credibility as a fit and proper person to be restored to the Roll;

(c) the applicant admitted that he had committed a technical error in retaining the costs due to the complainant; and

(d) the Bar Council failed to receive documentary evidence from the applicant that he has made good the monies due and owing to the complainant.

[28] Regarding fact (b), the applicant responded by producing references from three advocates and solicitors of the High Court of Malaya (exhs 'AS1' — 'AS3' annexed to the applicant's first affidavit in reply affirmed on 18 October 2011). These references basically vouched for his credibility as a fit and proper person to be restored to the Roll. The respondent did not venture to refute or challenge these references by way of a reply.

[29] As for facts (c)–(d), the applicant's stand is that he has obtained an allocatur for the amount of RM52,430.95 after the bill of costs between solicitor and client in the 1996 case has been taxed on 18 October 2002.

[30] Further to this sum is the RM100,000 damages as mentioned earlier and an allocatur for RM219,247 (see exhs AS4 till AS8 in the applicant's first affidavit in reply) due to the applicant from the complainant's company of which he was a director. The company is not able to pay this judgment sum obtained by the applicant (see exh AS9). As a result, the applicant is 'no longer required to make good the sum due and owing to the complainant' by picking from reference AS1. The subject matter of the complaint has evidently run its proper course with the end result that the applicant has a outstanding judgment against the complainant's company.

[31] It is incumbent upon the court to exercise its discretion for applications of this nature according to the particular facts of the case and having regard to the materials put before it (see *Teoh Hooi Leong v Bar Council, Malaysia*). The key words are 'fair and reasonable' under s 107(1) of the Legal Profession Act and again I am guided by *Teoh Hooi Leong*'s case. In my considered opinion, the applicant has cogently discharged his burden based on affidavit evidence in convincing me that he is now a fit and proper person to have his name restored to the Roll. I also do not see anything which is against the public interest to order otherwise. The applicant has adequately paid his dues for what he ought not have done in the first place.

[32] In considering the particular facts and circumstances of this case, it is in my view fair and reasonable to allow the application by restoring the applicant's name to the Roll.

Application dismissed with costs.

Reported by Kanesh Sundrum